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Sabah Credit Corp v Wilayah Fabrication Sdn Bhd & Ors

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO CSK 22–54 OF 1995
SULONG MATJERAIE J
15 JULY 2005

B

Banking — Banks and banking business — Recalling of loan — Notice of demand issued — Notice demanded slightly larger amount to be paid — Whether defendant prejudiced — Whether plaintiffs could properly recall facilities in accordance with loan agreement — Whether service of notice of demand properly effected

C The plaintiffs were at all material times a duly licensed finance company and the first defendant was a company incorporated in Malaysia. By a loan agreement ('the loan agreement') the plaintiffs granted the first defendant a loan facility in the sum of RM3 million. By a guarantee agreement ('the guarantee'), the second and third defendants and another jointly and severally guaranteed to
D pay the plaintiffs for all advances made to the first defendant up to a total sum of RM3 million together with interest thereon from the date of demand for payment. In breach of the loan agreement, the first defendant failed to regularise the loan facility granted. The plaintiffs claimed against the first defendants.

E

Held, allowing the plaintiffs' claim:

(1) The fact that the notice demanded a slightly larger amount to be paid could not in any way prejudice the defendant as the defendant did not pay anything at all. Any variation of the figures after a full trial could not
F possibly prejudice the defendants especially so when the amount the defendant was required to pay was substantially reduced; *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 followed (see para 11).

(2) It was a term of the loan agreement that the loan must be settled within 30 months. No evidence was adduced to indicate that the plaintiff had
G agreed to any extension of the date of settlement. As the defendant failed to settle the loan within 30 months, the plaintiffs could properly recall the facilities in accordance with the loan agreement (see paras 12 and 13).

(3) The plaintiff had sent a letter each to the first and third defendants
H demanding the payment of the debt payable within 14 days. Those letters were sent by AR Registered post to their last known address and these modes of service were expressly authorised by the first and third defendant as per cl 35 of the loan agreement and cl 18 of the guarantee. Hence the defence of not receiving the letters of demand remained as
I bare denial as the defendants were deemed to have received the said letters by virtue of the deeming provision in the loan agreement and the guarantee (see para 15).

[**Bahasa Malaysia summary**

Plaintif pada masa material merupakan sebuah syarikat kewangan berlesen dan defendan pertama adalah syarikat yang ditubuhkan di Malaysia. Melalui satu perjanjian pinjaman ('perjanjian pinjaman itu') plaintif-plaintif telah memberi defendan pertama satu kemudahan pinjaman sebanyak RM3 juta. Melalui satu perjanjian gerenti ('gerenti itu') defendan kedua dan ketiga dan satu lagi secara bersesama dan berasingan menjamin untuk membayar plaintif-plaintif untuk sebarang pinjaman yang dibuat kepada defendan pertama sehingga jumlah RM3 juta bersama dengan cagaran dari tarikh permintaan untuk pembayaran. Dalam memungkiri perjanjian pinjaman itu, defendan pertama gagal membayar kemudahan pinjaman yang diberikan. Plaintif-plaintif menuntut terhadap defendan pertama.

Diputuskan, membenarkan tuntutan plaintif-plaintif:

(1) Fakta bahawa notis menuntut jumlah yang lebih untuk dibayar tidak boleh memprejudiskan defendan dalam apa cara pun kerana defendan tidak membayar apa-apa pun. Sebarang variasi dalam angka-angka selepas pembicaraan penuh tidak boleh memprejudiskan defendan-defendan terutamanya apabila jumlah yang perlu dibayar oleh defendan telah dikurangkan; *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 diikut (lihat perenggan 11).

(2) Adalah satu terma perjanjian pinjaman bahawa pinjaman itu mesti diselesaikan dalam tempoh 30 bulan. Tiada keterangan dikeluarkan untuk menunjukkan bahawa plaintif telah bersetuju untuk melanjutkan tarikh penyelesaian. Oleh kerana defendan gagal untuk menyelesaikan pinjaman dalam tempoh 30 bulan, plaintif boleh menarik balik kemudahan-kemudahan mengikut perjanjian pinjaman (lihat perenggan 12 dan 13).

(3) Plaintif telah mengirim sepucuk surat tuntutan kepada defendan pertama dan ketiga menuntut untuk bayaran hutang yang perlu dibayar dalam masa 14 hari. Surat-surat itu telah dihantar dengan menggunakan pos AR berdaftar kepada alamat terakhir yang diketahui dan cara yang digunakan untuk mengepos surat-surat itu telah dipersetujui oleh defendan pertama dan ketiga seperti mana dalam kl 35 perjanjian pinjaman dan kl 18 gerenti itu. Oleh itu, pembelaan bahawa defendan tidak menerima surat tuntutan itu adalah sekadar 'bare denial' kerana defendan-defendan dikatakan telah menerima surat itu mengikut peruntukan di dalam perjanjian pinjaman dan gerenti itu (lihat perenggan 15).]

Notes

For a case on recalling of loans, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1756.

Cases referred to

BSN Commercial Bank (M) Bhd v KDG Holdings (M) Sdn Bhd [1991] 1 MLJ 567 (refd)
Chung Khiaw Bank Malaysia Bhd v Raju Jayaraman Kerpaya [1995] 1 LNS 51 (refd)
Public Bank Bhd v Chan Siok Lie & Ors [1989] 2MLJ 305 (folld)
Shell Marketing Co Borneo Ltd v Wee Boon Ping [1990] 1 CLJ 564 (refd)
Sungei Way Leasing Sdn Bhd v Goh Nai Khoo [1997] 2 CLJ Supp 541 (refd)

Chan Wai Ling (Clement Chaim with her) (Nicholas Fung Tokuzip & Co) for the plaintiffs.
Sugumar Balakrishnan (Natasha Isabella S Balakrishnan with him) (Sugumar & Co) for the first and third defendants.

Sulong Matjeraie J:

BACKGROUND

[1] The plaintiffs were and are at all material times a duly licensed finance company carrying on its business at Wisma Perbadanan Pinjaman Sabah, Pekan Baru Donggongon, Penampang, Sabah and the first defendant is a company incorporated in Malaysia having its place of business at Jalan Ranca-Ranca Industrial Area, PO Box 161, 87008 Labuan.

[2] By a loan agreement dated 11 July 1989 ('the loan agreement') the plaintiffs granted the first defendant a loan facility in the sum of RM3 million with the following terms:

(1) Interest at the rate of 12% per annum on monthly rests on every sum advanced;

(2) The first defendant agreed to pay the principal sum with the agreed interest rate, commission, discount and other usual charges 30 months from the date of the loan agreement by deducting a minimum of 30% of all the assigned payment received from Shell Group of Companies;

(3) The loan facility was further secured by:

(i) a deed of debenture dated 11 July 1989;

(ii) charge on TL 207520125, TL 207520143, TL 207520456, CL 205313720, NT 203057550 and NT 5437 all situated in the Federal Territory of Labuan;

(iii) Joint and several guarantee of the second and third defendants executed on 7 June 1989;

(iv) A deed of assignment to assign all monies interest due and payable to the first defendant by Shell Group of Companies up to a minimum 30% of such payments to the plaintiffs.

[3] By a guarantee agreement dated 7 June 1989, the second and third defendants and another jointly and severally guaranteed to pay the plaintiffs for all advances made to the first defendant up to a total sum of RM3 million together with interest thereon from the date of demand for payment.

[4] In breach of the loan agreement, the first defendant failed to regularize the loan facility granted and as at January 1995 the outstanding loan together with the agreed interest in arrears due the plaintiffs was RM3,283,885.12, the amount which the plaintiffs are claiming against the first defendant with an agreed interest thereon at the rate of 12% per annum from 1 February 1995 until payment and costs.

[5] During the trial and particularly after hearing the testimonies of PW3 Ms Chong Nyuk Yun and PW4 Mr Sylvester Golou Asai, the amount claimed against the defendants by the plaintiffs had been reduced to RM2,537,17.08.

[6] As against the second and third defendants jointly and severally, the plaintiffs are claiming the sum of RM3 million, interests and costs.

DEFENCE

[7] The submission by learned defence counsel here is only in respect of the first and third defendants as action against the second defendant, a deceased, had been discontinued pursuant to a court order dated 26 August 2002.

[8] Four main issues were canvassed by the defendants and these are:

(1) Did the first defendants fail to regularize the loan facility despite repeated requests and or demand by the plaintiffs?

(2) Did the lst defendants receive the purported requests and/or demand to regularise the outstanding loan facility?

(3) Did the third defendant receive the purported requests/demand including notice of demand dated 13 February 1995? and

(4) There is a variation between the amount demanded and the amount claimed by the plaintiffs.

[9] At the outset, the learned counsel for the defendant applied to this court to be discharged as counsel. The application is at encl 30. I refused the application. My reason is simple. Apart from the fact that the plaintiffs are objecting to any further adjournment, I have also directed on 19 August 2002, that the hearing date for this case was fixed for two days, 5 and 6 April 2004. These two dates have been agreed to by the parties. To my surprise learned counsel for the defendant told me that they only sent two letters to the client, the first one on 26 January 2004 almost 20 months after my direction and the second one was two days before the actual date of trial. As I have allocated these two days almost two years before the actual date couple with the fact

that this is a pre-2000 case, I cannot allow further adjournment. Further, it is my belief that since counsel have been given the briefs very much earlier and that they have filed the defence to the statement of claim on 13 June 1995; instructions would have been given to them by then. Incidentally, learned counsel had in fact filed their written submission dated 22 July 2004 to this court on 23 July 2004. I therefore directed that the trial should proceed.

[10] In the event, the plaintiff called four witnesses while there was none from the defendant. Learned counsel for the defendant was however given the full opportunity to cross examine and accordingly cross-examined all the witnesses produced to the court. The four witnesses for the plaintiffs consisted of PW1, Ms Fiona Valerie Gom, the legal officer at the Sabah Credit Corporation, PW2 Mr Dickson Tsen Fen Fui @ Fun Fui, an advocate and solicitor, PW3 Ms Chong Nyuk Yun, an assistant accountant of the plaintiff and PW4 MrSylvester Golou Asai, an accountant with the plaintiff.

[11] The total loan approved and disbursed to the first defendant was RM3 million. After ascertaining all the figures produced in court the total amount paid by the defendants, including monies paid by the receivers and managers from the landed properties which had been foreclosed was RM3,214,897.23 The amount claimed by the plaintiffs in their letter of demand to the first defendant was RM3,283,885.12. Of course, the guarantors were only required to pay RM3 million that they promised to pay and were accordingly demanded the said sum. After hearing testimonies from the witnesses in court, this figure was reduced by the plaintiff to RM2,537,170.08. This uncertainty of figures led the learned counsel for the defendant to quote the case of *Sungei Way Leasing Sdn Bhd v Goh Nai Khoo* [1997] 2 CLJ Supp 541 which says that it was good sense that the guarantor should know the amount he has to pay. Indeed, I respectfully agree with such sentiment. However, as in this instant case, if the amount now demanded by the plaintiff is much more than the actual amount that one is required to pay, I suggest that it will not prejudice the guarantor. How could the guarantor complain? The letter of demand says that he needs to pay RM3million and as it turns out he needs only pay RM2,537,170.08. Similarly in the case of the first plaintiff, the amount demanded was RM3,283,885.12 and now it needs only pay RM2,537,170.08. They cannot be prejudiced by such reduction of figures. I find comfort in the ruling of Shankar J (as he then was) in *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 where he said, *inter alia*, at p 308: 'Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in a notice, the notice will be invalidated.' Similar decision was made in *Shell Marketing Co Borneo Ltd v Wee Boon Ping* [1990] 1 CLJ 564. Abdul Hamid Mohamed J (as he then was) said in *Chung Khiaw Bank Malaysia Berhad v Raju Jayaraman Kerpaya* [1995] 1 LNS 51: 'It should be pointed out that in the present case, my decision was given after a full trial. It would be most unjust if, just because the notice demanded a few Ringgit more than the amount the court, after a

full trial, found to be due, the debtor is relieved from paying the whole amount due and owing. Furthermore, in this case, the fact that the notice demanded a slightly larger amount to be paid could not in any way prejudice the defendant as the defendant did not pay anything at all'. With respect, I fully agree with the sentiment expressed and therefore rule that any variation of the figures after a full trial in this instant case cannot possibly prejudice the defendants especially so when the amount the defendant is required to pay is substantially reduced. The figure of RM2,537,170.08 is accepted and this will replace the amount of RM3,283,885.12 being the total sum demanded.

[12] Based on the submission at encl 40, learned counsel for the defendant argued in court that the first defendant had regularised the loan facilities and suggested that PW3 and PW4 have testified that repayments were made though not enough to settle the amount outstanding. Further it was argued that from the statement of account a payment was made in June 1995 after the notice of demand which was dated 13 February 1995. I cannot however accept this argument as it is a term of the loan agreement that the loan must be settled within 30 months. The loan agreement was executed on 11 July 1989 and therefore it should be settled by 11 January 1995. No evidence was adduced to indicate that the plaintiff have agreed to any extension of the date of settlement.

[13] As the defendant failed to settle the loan by then, the plaintiffs in my view could properly recall the facilities in accordance with the loan agreement. I fail to find within the loan agreement that there is a condition precedent that facilities cannot be recalled unless there is a repeated request to regularise the loan facilities. I could however find at cl 12 of the loan agreement which allows the plaintiff to demand for payment upon the happening of any event of default at cl 13 thereof. Clause 13(a) thereof stipulates that the plaintiff can demand for payment if the defendant fails to pay when due, any sum of interest instalment or principal or other sums or money when due hereunder in accordance with the terms of the loan agreement. To me this clause empowers the plaintiff to demand for payment.

[14] The issue of wrongful termination was also brought up and argued at great length by learned counsel for the defendant, but as this was not pleaded, there is no need for me to say anything more on it. Learned counsel also dealt rather extensively on the notice of demand to both the first and third defendants. Sadly, no evidence was adduced to say that they have not received any written notice and such evidence could not be produced because of the absence of the first and third defendants. In any event, the letters of demand were sent in accordance with the addresses stated in the loan agreement as well as those found in the guarantee. Learned counsel for the defendants argued that those addresses were wrong but the defendants could have corrected them before they signed those documents. The plaintiff could not be faulted should the address be wrong.

[15] The plaintiff had on 13 February, 1995 sent a letter each to the first and third defendants demanding the payment of the debt payable within 14 days. Those letters were sent by AR Registered post to their last known address and these modes of service were expressly authorised by the first and third defendant as per cl 35 of the loan agreement and cl 18 of the guarantee. Clause 18 of the guarantee stipulates that 'Any notice or demand hereunder *shall be deemed* to have been sufficiently given if sent by prepaid registered post to our addresses last known to the plaintiff or stated therein and shall be assumed to have reached us in the course of post.' Similarly cl 35 of the loan agreement provides: 'Any notice or communication under or in connection with this loan shall be in writing and shall be delivered personally, or by post, telex or cable to the addresses given in this loan or at such other address as the recipient may have notified to the other parties in writing. Proof of posting or dispatch shall be deemed to be proof of receipt …'.

[16] Evidence was adduced in court to prove the issuance of the demand by the plaintiffs' solicitors, PW2. Proof of service was tendered at pp 80 and 81 of exh P1. The first and third defendants have not shown that there is any other address known by the Bank before the posting of the letters, hence their defence of not receiving the letters of demand remains as bare denial as they are deemed to have received the said letters by virtue of the deeming provision in the loan agreement and the guarantee. Based however on the case of *BSN Commercial Bauk (M) Bhd v KDG Holdings (M) Sdn Bhd* [1991] 1 MLJ 567: 'There having been no denial by affidavit by the defendants of receipt of demand, they must be taken to have received them …' per Abdul Aziz J (as he was then) at p 571.

[17] Learned counsel for the defendants had also argued that the third defendant being a guarantor cannot be liable as a principal debtor. This argument is untenable as cll 1(c), 15 and 16 of the guarantee stipulate that the third defendant agrees to bear the liability as the principal debtor and cannot argue that his liability is secondary to that of the first defendant.

[18] I am satisfied therefore that the plaintiffs have proven their claim on a balance of probabilities. The defendant on the other hand failed to produce any evidence to support their defence. In the circumstances, I therefore give judgment for the plaintiff in the sum of RM2,537,170.08 against the first and third defendants jointly and severally together with statutory interest of 8% per annum from the date of judgment to the date of payment and costs to be taxed unless agreed.

Order accordingly.

Reported by Peter Ling